Supreme Court, U. S.
FILED
JUN 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-2062

DENNIS ROY CHOATE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Dennis Roy Choate, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 21, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, designated for publication, but not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 21, 1980. A timely petition for rehearing en banc was denied on June 3, 1980. This petition is filed within thirty days of that date. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code § 1254(1).

QUESTION PRESENTED

Does this Court's decision in United States v. Caceres (1979) 440 U.S. 741 preclude suppression of evidence obtained

by a mail cover where the violation of the agency regulation consists of submitting an application containing intentionally false statements, in violation of a federal perjury statute?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code § 1001 provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

On August 21, 1974, petitioner was charged with two counts of understating his income on federal income tax returns in violation of Title 26, United States Code, § 7201. He pled not guilty and moved to dismiss the indictment upon the basis, in part, that his attorney-client relationship had been violated by the illicit activities of a paid government informant. The District Court, the Honorable Warren J. Ferguson, Judge Presiding, conducted an evidenciary hearing and thereafter granted the motion to dismiss. The Court of Appeals reversed, holding that the evidence had failed to establish that petitioner's Sixth Amendment rights had been infringed. (United States v. Choate, [9th Cir. 1975] 527 F.2d 748).

On remand, the District Court conducted an evidenciary hearing upon petitioner's motion to suppress all of the government's evidence against him. The basis of the motion was that said evidence had been obtained by a mail

cover of petitioner's correspondence, which mail cover violated petitioner's Fourth Amendment rights. The District Court agreed and granted the motion to suppress. (United States v. Choate, [C.D. Cal. 1976] 422 F.Supp. 261).

On appeal by the government, the Court of Appeals, over Judge Hufstedler's dissent, again reversed the District Court, ruling that the mail cover did not impermissibly invade any reasonable expectation of privacy. (United States v. Choate, [9th Cir. 1978] 576 F.2d 165). The opinion of the Ninth Circuit, however, at page 173 thereof, specifically noted that the veracity of the mail cover application had not been called into question and thus found that it would be inappropriate for the Court of Appeals to determine the truthfulness of that document.

With this caveat in mind, the petitioner, on remand, again moved the District Court to suppress all of the evidence, alleging with specificity, and offering to prove, that the entirety of the mail cover application was permeated with intentionally false statements

without which no mail cover could have or would have been obtained. To that effect, the defense showing set forth numerous specified areas of separate and distinct intentional false statements.

At the hearing on the motion, the District Court refused to permit petitioner to introduce any evidence to the effect alleged and denied the motion to suppress. The ruling of the District Court was that based on the decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741, and the decision of the Ninth Circuit in its previous decision, United States v. Choate, (9th Cir. 1978) 576 F.2d 165, proof of said allegations could not result in the supression of the evidence. The rationale was that Choate II established that mail covers fall outside the ambit of the Fourth Amendment, and that while intentionally false statements would violate postal regulations, Caceres did not permit suppression of evidence for non-compliance with agency rules.

On appeal following the determination of guilt by the District Court upon

stipulated facts, the Ninth Circuit affirmed the ruling of the lower court denying the motion to suppress evidence. The rationale of the Court of Appeals corresponded to that adopted by the District Court, to the effect that under Choate II and Caceres, the exclusionary rule was inapplicable as the submission of intentionally false statements to the government agency did not itself violate the federal Constitution, but rather violated only agency regulations, the breach of which was not shown to have affected petitioner's conduct. (Appendix, page 3).

It is this erroneously narrow and fundamentally unjust misconstruction of the standards set forth in Caceres which the instant petition challenges.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS TOTALLY AT VARIANCE WITH THIS COURT'S DECISION IN UNITED STATES v. CACERES, IMPERMISSIBLY SANCTIONS PERJURY COMMITTED BY GOVERNMENT AGENTS IN VIOLATION OF FEDERAL STATUTE, AND OBTAINS A FUNDAMENTALLY UNJUST RESULT.

The decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741 was carefully crafted. It established that the question of whether a violation of agency regulations would result in the suppression of evidence thereby obtained was to be determined on a case by case basis, and concluded that on the facts there presented, suppression was unwarranted.

The facts found significant by this Court in Caceres are easily gleaned from the language of that opinion. There the acts which constituted the violation implicated neither the federal Constitution nor any federal statute. The agents' actions were reasonable, and in good faith, in a situation where no one

questioned that monitoring was appropriate, and authorization would have been forthcoming even absent the disputed action. Further, said violation was technical in nature, involving a legal interpretation of a complexly drafted regulation, and took place in an emergency situation where the activity complained of was approved by higher agency officials.

The facts presented in the case at bench are far removed from those established in Caceres. Here, the petitioner alleged in detail, and offered to prove with specificity, that all of the government's evidence was the product of a mail cover issued by postal authorities upon written application of a govenment agent, which application was replete with separate and distinct and intentionally false statements, in violation of federal perjury statutory law, and without which false statements the cover would not have been issued and the evidence would not have been obtained.

Given proof of these facts, Caceres all but mandated suppression of the

evidence obtained by the mail cover. First, while we do not attempt to write here the definitive constitutional treatise as to whether use of evidence obtained by a perjured federal application directly offends the Fifth Amendment Equal Protection or Due Process clauses, or the Fourth Amendment itself, it seems clear that such activity at least "implicates" those provisions within the meaning with which that term is employed in Caceres.

Second, the activities here complained of constituted a clear violation of the federal false statement statute, Title 18, United States Code § 1001.[1/]

1/ This section reads as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

The existence of an element of this nature is one which Caceres plainly categorizes as warranting suppression of the evidence obtained. As this Court expressly stated in Caceres, at 99 S.Ct. 1473, footnote 21, had a violation of a federal statute been made out, this Court's earlier decision in Miller v. United States (1958) 357 U.S. 301, authorizing suppression of evidence obtained by violation of federal statute, would have been controlling.

Finally, not only are none of the other factors relied upon in Caceres present in the case at bench; rather the record makes clear that in each instance, the polar opposite of every such factor was established. To paraphrase Caceres, the use of intentionally false statements here was not reasonable, not in good faith, not in a situation where the true facts warranted a finding that monitoring was appropriate, and authorization would not have been forthcoming absent the perjury. The violation was not technical in nature, was not occasioned in an emergency situation, and was not approved by higher officials.

The decision of the Ninth Circuit in the case at bench so severely distorts these three areas of this Court's ruling in Caceres that the parent decision is no longer recognizable. As interpreted by the Court of Appeals here, Caceres stands for the proposition that suppression issues stemming from violations of agency regulations are not to be determined on a case by case basis. Rather, unless the violation of the agency regulation concomitantly directly violates the Constitution, suppression of evidence obtained thereby may not be ordered. This result further is to be uniformly achieved without consideration of the nature of the violation or the application of any relevant statutory framework.

In this context, the case at bench directly presents a federal issue of substantial magnitude. The decision of the Court of Appeals, by erroneously construing the essence of this Court's decision in Caceres, thus determines that government agents may obtain evidence for use in a criminal prosecution by use of perjured statements in violation of a

federal statute directly forbidding the same, without fear that said evidence will be suppressed at trial. The decision thus not only obtains a fundamentally unjust result, but calls into disrepute the entire Governmental function.

This Court should grant the relief requested to remedy the dangerous implications of the decision of the Court of Appeals.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 21 1980

RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	) No. 79-1505
DENNIS ROY CHOATE, Defendant-Appellant.	) OPINION

Appeal from the United States District Court for the Central District of California

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Before: MERRILL and ALARCON, Circuit Judges, and TEMPLAR,* District Judge.

Per Curiam

This is the third appeal to this court involving a two-count indictment in which

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*Honorable George Templar, Senior United States District Judge for the District of Kansas, sitting by designation.

defendant-appellant was charged in each count with income tax evasion. Twice, motions of defendant to dismiss were sustained by the trial court and in each instance, the dismissals were reversed. (United States v. Choate, 527 F.2d 748 (9th Cir. 1975) (I), and United States v. Choate, 576 F.2d 165 (9th Cir. 1978) (II). On remand, defendant moved to dismiss the indictment, claiming impermissibly discriminatory law enforcement and error by the trial court in refusing to suppress evidence resulting from the use of a "mail cover" obtained by an application which allegedly contained intentional false statements, thus violating applicable postal regulations. The motion to dismiss was overruled. A jury having been waived, the case was submitted to the court on stipulations. Defendant offered no evidence and was found guilty by the court. A motion for a new trial was denied and the defendant was sentenced. This appeal followed.

THE MAIL COVER ISSUE

Defendant seeks to have this court reconsider its decision in United States v. Choate, 576 F.2d 165. The elaborate opinion in that case discloses that this court considered at length and in detail the contention advanced by defendant that the use of the mail cover in this case was in violation of Postal Regulations; that the use of the mail cover allegedly obtained violated his constitutional rights under the First, Fourth and Ninth Amendments. A repetition of the court's holdings on these issues would add nothing to the body of the law on the subject of mail covers so ably considered in the earlier appeal (Choate II).

The defendant now urges us to determine that the trial court should have suppressed the evidence resulting from the mail cover because the agent made intentionally false statements to the postal authorities in his request for the cover. Defendant contends that when his latest motion to suppress was presented, he should have been afforded a hearing

to establish the intentional falsity of the statements contained in the application of the agent for a mail cover and a determination that evidence developed through information obtained by the mail cover should have been suppressed. Basically, defendant insists that he is entitled to the protection of regulations promulgated by the Postal Department[1/]

1/ 39 C.F.R. § 233.2(e)(1)(ii)(1975). A parallel provision gives the Chief Postal Inspector the added authority to order mail covers when necessary to protect the national security:

> (2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:
>
> (i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.
>
> (ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.
>
> 39 C.F.R. § 233.2(d)(2)(1975).

and that when violated by an agent of the government, any information obtained must be suppressed. But this contention is contrary to the holding in United States v. Choate (II), where it was decided that no constitutional inhibition was involved in the use of a mail cover in this instance.

The court below in denying defendant's motion ruled that the exclusionary rule did not apply in this case, relying on Choate (II) and United States v. Caceres, 440 U.S. 741 (1979). We believe the trial court correctly applied the law announced in the majority opinion in Choate (II) and in United States v. Caceres, supra.

Here, none of defendant's constitutional rights were violated. Cf. Smith v. Maryland, 47 U.S.L.W. 4779, June 20, 1979, 99 S.Ct. 1682.

Defendant contends that the alleged falsity of the request for mail cover made on July 19, 1972, by Customs Agent Williams violated postal regulations and required suppression of evidence obtained

by virtue of its use. Even if it be established that the request contained false statements, suppression of the evidence obtained would not be required.

Where violation of an agency regulation does not raise a constitutional question and defendant "cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct," he may not in a criminal prosecution "seek judicial enforcement of the agency regulation by means of the exclusionary rule." This was the reasoning in Caceres and it was correctly followed by the court below in this case. No hearing was required under such circumstances.

NO DISCRIMINATORY LAW ENFORCEMENT

Defendant argues that the trial judge should have ordered an evidentiary hearing on the issue of discriminatory law enforcement because the Internal Revenue Service violated its policy of not prosecuting persons who voluntarily disclose and rectify false statements in their tax returns. Defendant's argument is based

on a misunderstanding of the current Revenue Service policy.

In January 1972, three weeks before I.R.S. began its investigation of Choate, the treasury department changed its voluntary disclosure policy. In announcing the change, the Department of Justice Manual for Criminal Tax Trials, Chapter 1, page 5, reads:

> "It is therefore no longer an administrative basis for declining prosecution in the Revenue Service that a prospective defendant voluntarily revealed his tax fraud to an appropriate official of that Service before any investigation of his affairs had begun. Now the fact that a taxpayer seeks voluntarily to rectify a false return is given some weight but is not conclusive of the issue."

Because there was no longer a policy affording immunity for voluntary disclosure, the defendant's argument that I.R.S. failed to follow its own administrative policies in prosecuting him fails. Cf. Sullivan v. United States, 348 U.S. 179 (1954).

To prove discriminatory prosecution, one must establish that the selection of a suspect was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification. Oyler v. Boyles, 368 U.S. 448, 456 (1962). This rule has been enlarged upon by the Ninth Circuit. "[The defendant] must show that his selection was based on an impermissible ground such as race, religion or exercise of his first amendment right to free speech [citations omitted]." United States v. Scott, 521 F.2d 1188, 1195 (1975), cert. denied, 424 U.S. 955 (1976).

The appeal of the defenant does not present a claim that his prosecution was based on his exercise of a first amendment right, nor does he assert that the prosecution was instituted because of his race or religion. Instead he claims he was prosecuted because he was suspected of another offense which the attorneys for the government felt they could not prove at the time.

Under these circumstances, there is no discriminatory prosecution and no denial of Equal Protection of the law. As was so well stated in United States v. Manno, 118 F.Supp. 511 (N.D. Ill. 1954):

> [C]itizens are entitled to equal protection of the law, but these decisions do not hold that citizens are entitled to equal protection from the laws. The fact that not all criminals are prosecuted is no valid defense to the one prosecuted . . . [T]he administration of such a matter lies in the discretion of the prosecuting attorney.
>
> Id. at 515

It is not irrational in a world where resources do not permit prosecution of every suspected criminal that the government would give high priority to prosecuting those who, in addition to being suspected of tax evasion, were also suspected of other serious offenses. Such a standard operates to reduce crime more effectively than a policy based on random enforcement.

Because the defendant has not set forth a cognizable claim of discriminatory

law enforcement, the trial court did not err in denying the evidentiary hearing on the claim.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

JUN 3 1980

RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DENNIS ROY CHOATE, Defendant-Appellant.	D.C. No. CR 74-1250 WJF C.A. No. 79-1505 O R D E R

Before: MERRILL and ALARCON, Circuit Judges, and TEMPLAR, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Alarcon has voted to reject the suggestion for rehearing en banc and Judges Merrill and Templar have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-2062

In the Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2062

DENNIS ROY CHOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court correctly denied petitioner a hearing to determine whether the Bureau of Customs agent requesting a mail cover made material misrepresentations of fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–10) is reported at 619 F. 2d 21. Prior opinions of the court of appeals in this case are reported at 527 F. 2d 748 (*Choate I*) and 576 F. 2d 165 (*Choate II*). The decision of the district court is unreported, although a prior decision of the district court is reported at 422 F. Supp. 261.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980, and a petition for rehearing was denied on June 3, 1980 (Pet. App. A–11 to A–12). The petition for a writ of certiorari was filed on June 27, 1980. The jurisdiction of this Court is invoked under 28 US.C. 1254(1).

STATEMENT

In April 1972, the Federal Bureau of Customs resumed a previously closed investigation into petitioner's alleged involvement in illegal narcotics activities. As part of the investigation, Agent Williams of the Federal Bureau of Customs wrote to the Postal Inspector of Los Angeles, California, on July 19, 1972, requesting a mail cover[1] of petitioner's first and

[1] Under a "mail cover," a record is made of any data (*e.g.*, postmarks, sender's return address) appearing on the outside cover of first class mail and of the contents of other classes of mail. See 39 C.F.R. 233.2(c)(1). The question in this case involves only data obtained from the exterior of petitioner's first class mail.

fourth class mail for 30 days. Williams' letter advised the Postal Inspector that petitioner was currently under investigation for narcotics smuggling, that Williams believed that petitioner was organizing a smuggling ring with a primary source located in South America, and that it was "felt" that petitioner corresponded by mail with the South American source. See *United States* v. *Choate,* 576 F. 2d 165, 169 (9th Cir.), cert. denied 439 U.S. 953 (1978) (*Choate II*). The Postal Inspector approved the mail cover. *Choate II, supra,* 576 F. 2d at 171–173.

As a result of the mail cover, Williams discovered the identity of various financial institutions with which petitioner dealt. The Customs Service provided the names of these institutions to the Internal Revenue Service, which, in turn, commenced a tax investigation of petitioner and obtained information from the financial institutions identified by the mail cover. Petitioner was subsequently charged by indictment with willfully attempting to evade his taxes for the years 1970 and 1971, in violation of 26 U.S.C. 7201.

Prior to trial, petitioner moved to suppress all of the government's evidence.[2] The district court granted petitioner's motion to suppress, holding that the mail cover was a warrantless search and seizure in violation of the Fourth Amendment. The district court also

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[2] Previously, the trial court had dismissed the indictment upon the ground that the activities of a government informer had violated petitioner's Sixth Amendment right to counsel. Upon the government's appeal, the Ninth Circuit reversed, *United States* v. *Choate*, 527 F. 2d 748 (1975), cert. denied, 425 U.S. 971 (1976) (*Choate I*).

found that the letter requesting the mail cover did not comply with the provisions of the postal regulations, which require that the letter requesting the mail cover "stipulate[] and specif[y] the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime." See 39 C.F.R. 233.2(e)(1)(ii); *Choate II, supra,* 576 F. 2d at 169–172. The court of appeals reversed, holding that the request complied with the Postal Service regulations and that a warrantless mail cover did not violate the Fourth Amendment. *Choate II, supra,* 576 F. 2d at 171–180. This Court denied certiorari. 439 U.S. 953 (1978).

On remand, petitioner again moved to suppress the evidence obtained from the mail cover, contending this time that the facts alleged in the application for the mail cover were intentionally false (Pet. 6–7; Pet. App. A–2; April 16, 1979, Tr. 10–11, 17). The district court denied the motion without a hearing, holding that even if Agent Williams had intentionally misrepresented facts in his letter, suppression was inappropriate. The case was then tried by the court upon stipulated facts, and petitioner was convicted on both counts (April 16, 1979, Tr. 27–29, 34). Petitioner was sentenced to two years' imprisonment and fined $10,000 on each count, the sentences to run concurrently. Execution of the sentence was suspended and petitioner was placed on probation for five years (June 11,

1979, Tr. 50–51).[3] The court of appeals affirmed (Pet. App. A–1 to A–10).

ARGUMENT

Petitioner contends (Pet. 9–14) that the evidence obtained as the result of the mail cover in this case should be suppressed, because the mail cover was allegedly instituted in violation of applicable Postal Service regulations. Specifically, petitioner asserts that the agent requesting the mail cover made intentional false statements regarding the investigation of petitioner and that, without those false statements, the agent's written request for a mail cover did not "specif[y] * * * reasonable grounds * * * which demonstrate [that] the mail cover * * * would assist in obtaining information concerning the commission or attempted commission of a crime." 39 C.F.R. 233.2 (e)(1)(ii). See 39 C.F.R. 233.2(d)(2)(ii)(C).[4] The court of appeals correctly rejected this claim in a decision that does not conflict with any decision of this Court or of any court of appeals. Further review is unwarranted.

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[3] As a condition of probation, petitioner was required immediately to employ in his boat-building business two ex-offenders. Thereafter, he was required to hire one additional ex-offender each month until he was employing six ex-offenders in his business. The terms of probation required petitioner to maintain the employment of the six ex-offenders during the entire probationary term. The fine was to be reduced by permitting petitioner to deduct $2,000 from the fine each year for his participation in the employment program. Alternatively, petitioner's fine would be reduced by $2,000 each year if petitioner contributed $2,000 each year to a charitable fund (June 11, 1979, Tr. 50–51).

[4] Petitioner does not contest that the requesting letter, if accurate, fully satisfied the Postal Service regulations.

First, even assuming that the violation of the Postal Service mail cover regulations could ever be the basis for suppressing evidence in a criminal case, petitioner failed to make a substantial preliminary showing that the agent's request for a mail cover contained material false statements. In *Franks* v. *Delaware,* 438 U.S. 154 (1978), this Court made clear that a district court need not conduct an evidentiary hearing with regard to conclusory or unsubstantiated allegations regarding the falsity of an affidavit supporting a search warrant (*id.* at 171; emphasis added):

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those *allegations must be accompanied by an offer of proof.* They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or swo n or otherwise reliable statements of witnesses should be furnished,* or their absence satisfactorily explained.

Here, petitioner argues that the initial investigation of petitioner had terminated in 1971, that the agent's own testimony shows that he had no more recent information supporting his request for a mail cover, and that his allegations regarding petitioner's involvement in a South American drug ring were therefore obviously fabricated. In *Choate II,* however, the court below considered and rejected this claim, noting that the investigation had been "reopened by Special Agent

Lynn Williams on April 3, 1972, because of *additional* information received by the Bureau of Customs * * * [and] was continuing even at the time of the * * * 1976 hearings" and that the agent's testimony "can be read consistently with the contents of the letter" (576 F. 2d at 173 (emphasis supplied)).[5] Because petitioner's renewed motion to suppress following *Choate II* was not accompanied by any new affidavits or offer of proof, the district court was not required to conduct an evidentiary hearing even under the principles of *Franks* v. *Delaware, supra.*

In any event, the courts below correctly concluded that even if the request for a mail cover contained material misrepresentations in violation of agency

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[5] Agent Williams testified that upon reopening the investigation he determined that petitioner, who had no apparent substantial source of income other than his illicit activities, had recently bought two cars and a sailboat and that these large cash expenditures confirmed the reports of an informant regarding petitioner's drug trafficking activities (July 13, 1976 Tr. 52, 55–56). In addition, in an affidavit filed with the district court on remand from *Choate II*, Williams stated that at the time he made the request, he had been informed by his supervisor that an informant named Tommy claimed that petitioner was still actively engaged in drug dealing (Williams Affidavit of March 14, 1979, ¶¶ 5 & 9; April 16, 1979 Tr. 12).

We further note that even if the information underlying the request were in fact a year old rather than current, it is not apparent that that discrepancy is material to a request for a mail cover. Although year-old information might well be insufficient to support a finding of probable cause, the Postal Service regulations require only a reasonable basis for believing that the mail cover will aid in the detection of crime. Since a year-old informant's report would appear to satisfy that requirement, the district court was not required to conduct a hearing on an essentially immaterial point. See *United States* v. *DePoli*, No. 79–1465 (2d Cir. July 31, 1980), slip op. 4870–4872.

regulations, the evidence obtained as the result of that mail cover was admissible at trial. It is well settled that mail covers, which involve only the recording of information publicly exposed on the outside of various envelopes, do not violate the Fourth Amendment. See, *e.g.*, *United States* v. *Van Leeuwen*, 397 U.S. 249, 251 (1970); *United States* v. *DePoli*, No. 79–1465 (2d Cir. July 31, 1980), slip op. 4872; *United States* v. *Huie*, 593 F. 2d 14 (5th Cir. 1979); *United States* v. *Bianco*, 534 F. 2d 501 (2d Cir.), cert. denied, 429 U.S. 822 (1976); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Canaday* v. *United States*, 354 F. 2d 849 (8th Cir. 1966); *United States* v. *Schwartz*, 283 F. 2d 107 (3d Cir. 1960). See also *Smith* v. *Maryland*, 442 U.S. 735 (1979); *United States* v. *Miller*, 425 U.S. 435, 442 (1976). Indeed, we do not understand petitioner to contend otherwise.

Rather, petitioner's sole claim is that the violation of the Postal Service's regulations compels suppression of the evidence obtained as a result of the mail cover. But in *United States* v. *Caceres*, 440 U.S. 741, 755–756 (1979), the Court held that, ordinarily at least, the violation of an agency rule not required either by statute or by the Constitution is not an appropriate basis for suppressing relevant evidence in a criminal case.[6] See also *United States* v. *Payner*,

[6] The Court declined to rule on the government's contention that Fed. R. Evid. 402 and 18 U.S.C. 3501 prohibit the exclusion of relevant evidence in the absence of a constitutional or statutory violation. See 440 U.S. at 755 & n.22.

No. 78–1729 (June 23, 1980). Petitioner argues that *Caceres* is distinguishable insofar as that case involved a good faith violation of agency regulations, whereas here Agent Williams' purported violation of the regulations was allegedly willful.[7] Petitioner cites no authority for this narrow reading of *Caceres,* and we are aware of none. In the absence of a conflict and in light of the paucity of petitioner's allegations regarding the falsity of the agent's request for a mail cover, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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[7] Petitioner also suggests that *Miller* v. *United States*, 357 U.S. 301 (1958), is controlling here because the agent's false request violated 18 U.S.C. 1001. *Miller*, however, involved an arrest in violation of both statutory and common law principles designed to protect the arrestee's home. Here, in contrast, the mail cover did not violate any statute or the Constitution. At worst, the agent's request arguably violated Section 1001 which is designed to protect the agency and not an individual such as petitioner.

U.S. GOVERNMENT PRINTING OFFICE: 1980

Supreme Court, U. S.
FILED
OCT 22 1980
MICHAEL RODAK, JR., CLERK

79-2062

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The petitioner, Dennis Roy Choate, respectfully files this Brief in reply to the Brief for the United States in

Opposition to the Petition for Writ of Certiorari and argues as follows:

ARGUMENTS

I

PETITIONER SUFFICIENTLY ASSERTED THE EXISTENCE OF INTENTIONALLY FALSE MISSTATEMENTS IN THE MAIL COVER APPLICATION

The Government, in its Brief in Opposition, at page three thereof, concedes that Petitioner's motion to suppress in the District Court averred that the facts alleged in the application for the mail cover were intentionally false. At page three of that Brief the Government further concedes that the District Court below denied the motion without an evidentiary hearing on the sole precise basis that even if Petitioner were to establish intentional misrepresentations in the mail

cover application, still suppression was inappropriate under the decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741.

In this context it thus should be noted that the Government's present argument at page six of its brief -- that Petitioner's renewed motion to suppress was inadequate because not accompanied by any new affidavits or offer of proof -- was never raised by the Government at any stage of the proceedings. At all times, rather, at each level below, all parties concerned, including the prosecution, the defense, the District Court and the Court of Appeal, considered the question to be one of law: Did Caceres preclude relief even where a mail cover was obtained by intentional misstatements. At no time prior hereto has the Government

challenged the sufficiency of the defense moving papers, rightfully assumed by all parties to be sufficient.

Moreover, and more directly to the point, the record below clearly establishes that with respect to the sufficiency of the assertion of intentional misrepresentations the defense presentation was far more than adequate. Contrary to the position advanced by the Government, the two fold answer to the Government's contention is found in the Opinion of the Court of Appeal itself in Choate II, United States v. Choate (9th Cir. 1978), 576 F.2d 165.

The Government argues at pages five through six of its brief that the Court in Choate II had considered and rejected the defense claims that the mail cover application contained intentional false

misstatements. Based on this premise the Government argues that the defense was required to submit new affidavits or offers of proof. The failure of this argument, however, is that the Government's primary premise is erroenous.

The Opinion of the Court in Choate II, at page 173, rather makes it clear that the issue of the veracity of the application had not been litigated in that proceeding, and thus the Court decision would not pass on that matter in the appeal. The exact language of the Court, at page 173, was as follows:

> "Although the requesting letter was apparently prepared by Agent Williams (422 F.Supp. at 254), defendant on appeal and the district judge did not question Williams' veracity, and it is inappropriate for us as reviewing judges to impugn his truthfulness on the basis of a cold record that can be read consistently with the contents of the letter."

As is clear from the passage above, Choate II did not touch on the question of the sufficiency of the offer of proof of intentional false statements, and thus, contrary to the Government's contention, could not have ruled that the defense proffer was insufficient. The Government here simply misreads Choate II.

While the majority opinion in Choate II thus did not touch upon the question of intentional misrepresentations, the record below was sufficient to establish, as the dissent in Choate II had expressly noted at page 193 and footnote 31, that all of the material representations in the mail cover application were intentionally falsified. The areas of falsification, as contained in the record, were summarized by Judge Hufstedler in her dissent in Choate II at pages 193-195, in part, as follows:

"The mail cover request contained three material representations: (1) that the requesting authority had reason to believe Choate was "currently" organizing a narcotics smuggling ring with a South American source, (2) that it further believed that the source and Choate corresponded by mail, and thus (3) that a mail cover would aid in identifying the source,

"Williams had no "current" information on which he could assert that Choate was organizing a narcotics smuggling ring when he requested the mail cover on July 19, 1972. The only information to that effect was contained in Thompson's April, 1971, reports to the BNE which has been passed along to Customs. All efforts by Williams to obtain current information that would connect Choate with cocaine trafficking had failed (see notes and test at nn. 4-7, supra), and Thompson had informed Williams that he possessed no more recent information than that in the 1971 report. Most significant is the fact that Williams felt he could not "make a substantive case" against Choate for drug dealing, and this actually caused him to take the step of going to Sherrard of the IRS before instituting the mail cover and suggesting a tax investigation. Williams, in fact, testified that his reason for

instituting the mail cover was to look for more assets; he said nothing about a purported South American connection. Williams' testimony thus clearly revealed that he was fully aware at the time he made the mail cover request that he had no current information which indicated that Choate was organizing a smuggling ring.

"There was no indication in any of the information in Williams' possession that Choate had ever corresponded by mail with a South American contact. The averment to this effect was pure speculation based upon the initial misstatement of fact. Thompson's report indicated only that Choate had traveled to South America.

"Finally, the essential predicate for the mail cover was the statement that it was expected that it would aid in identifying the South American source. Williams' own testimony revealed, however, that prior to instituting the mail cover he had turned his attention fully to "asset tracing" and had given up any attempt to make a substantive case against Choate. (See nn. 31 & 38, supra.) This was the purpose of the mail cover -- not finding a South American address. Thus, each material representation in the request was false and known to be false by

> Williams at the time it was made. It was a bare-faced abuse of the mail cover procedure to obtain information and pursue an investigation apparently outside his jurisdiction -- asset tracing to establish a basis for an IRS prosecution -- by reciting false material facts which , if true, would logically have justified the surveillance. (See 422 F. Supp. at 271.)"

In the proceedings here below in the District Court, in Choate III so to speak, petitioner did challenge the veracity of the mail cover application and did specifically assert and offer to prove those matters described in detail in Judge Hufstedler's dissent. The Memorandum of Points and Authorities filed below quoted prior testimony to this exact effect in detail. The full offer is summarized at pages four through ten of the Appellant's Opening Brief below in the District Court, all to the same effect as Judge

Hufstedler's characterization. This offer of proof was clearly sufficient. The contentions of the Government to the contrary, made for the first time anywhere in this case at this level, and without support in the record, should be rejected.

II

THE INTENTIONALLY FALSE STATEMENTS AT ISSUE VIOLATED A FEDERAL STATUTE UNDER CIRCUMSTANCES FAR MORE SEVERE THAN IN UNITED STATES V. CACERES (1979), 440 U.S. 741 SO AS TO WARRANT RELIEF. (SEE UNITED STATES v. SOTO-SOTO (9th Cir. 1979), 598 F.2d 545).

The Government argues that intentional misrepresentations under oath in a non-Fourth Amendment area give no cause for suppression of evidence obtained by said false oaths. The Government thus urges that the federal perjury statute (18 U.S.C. § 1001) and this Court's decision

in Miller v. United States (1958), 357 U.S. 301, are to be severely limited in impact.

A recent Ninth Circuit decision, United States v. Soto-Soto (9th Cir. 1979), 598 F.2d 545, makes clear the illogic of the Government's position. It is sufficient here to quote from Soto-Soto, at page 550, in part:

> "The Court, however, specifically distinguished the Caceres situation from one where there has been a violation of a federal ___U.S. at ___, 99 S.Ct. at 1465. In footnote 21, ___U.S. at ___, 99 S.Ct. at 1473, the Court noted that "[s]ince no statute was violated by the recording of respondent's conversations, this Court's decision in Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 1332, is likewise inapplicable." In Miller, the Court excluded evidence obtained in violation of District of Columbia law and the substantially identical requirements of a federal statute.
>
> "Here, the FBI agent's action violated federal statutes. He

> ignored the divisions of authority which Congress carefully legislated. As in Miller, supra, the exclusionary rule is applicable."

Soto-Soto is equally applicable to the case at bench.

CONCLUSION

For all of the reasons set forth above it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner